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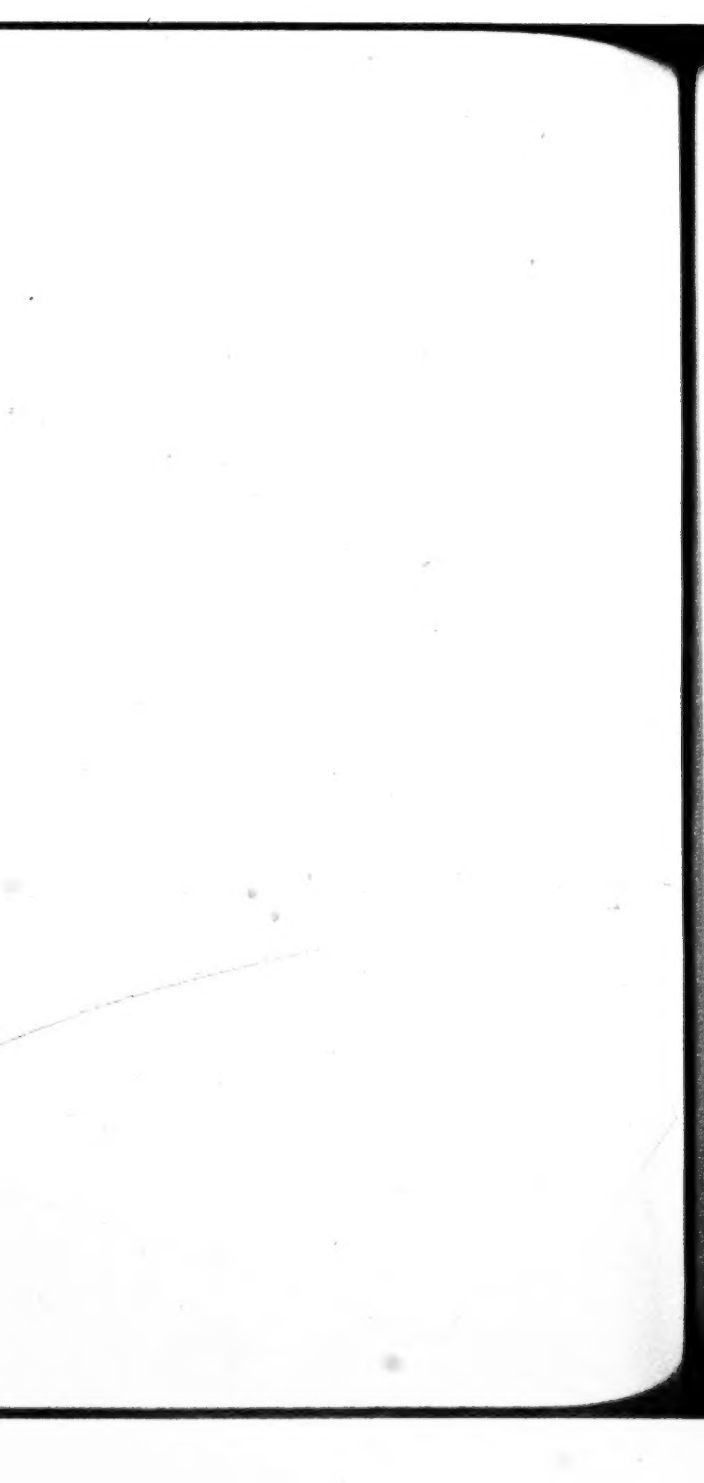
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In The
Supreme Court of the United States

October Term 1973

No. 73-786

MAJOR FRED R. ROSS AND
STATE OF NORTH CAROLINA,
Petitioners,

v.

CLAUDE FRANKLIN MOFFITT,
Respondent.

MAJOR FRED R. ROSS AND
STATE OF NORTH CAROLINA,
Petitioners,

v.

CLAUDE F. MOFFITT,
Respondent.

**BRIEF OF THE COMMONWEALTH OF VIRGINIA AS
AMICUS CURIAE IN SUPPORT OF THE PETITION FOR
A WRIT OF CERTIORARI TO THE JUDGMENT OF THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

INTEREST OF THE AMICUS CURIAE

The Petition for a Writ of Certiorari in this case was docketed in this Honorable Court on November 15, 1973, and the opinion of the United States Court of Appeals may

be found in *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).

The decision of the United States Court of Appeals for the Fourth Circuit in Case No. 72-1720, which was the case in the Court below dealing with the collateral attack on a conviction in Guilford County, North Carolina, is of particular concern to the Commonwealth of Virginia because the holding of the Court of Appeals in that case would require Virginia, through its Supreme Court, to appoint counsel to assist a criminal defendant in petitioning this Honorable Court for a Writ of Certiorari if a Federal question appropriate for review in this Court were raised. The holding of the Court of Appeals in the other case, Case No. 72-2480, is of only tangential interest to the Commonwealth of Virginia because it requires North Carolina to provide appellate counsel not only for an appeal as of right but also for a discretionary appeal to the Supreme Court of North Carolina. As the Court of Appeals points out, Virginia's appellate process consists of a single stage with discretionary acceptance of review at that stage but Virginia provides counsel for that appeal. Consequently, Virginia's principal concern is with the holding in Case No. 72-1720 but that concern is a very real one as Virginia does not now provide counsel to assist defendants in seeking review before this Honorable Court, nor does Virginia have any statutory or administrative framework for so appointing and compensating counsel.

Perhaps one barometer as to the possible impact of this ruling upon Virginia, and this Honorable Court, would be the impact that the prior holding of the United States Court of Appeals for the Fourth Circuit in *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969), had on the Commonwealth. In that case the Court of Appeals held that at the close of a criminal trial there was an obligation on either the trial court or counsel to advise the defendant of his right to

appeal, a procedure that was not previously followed by Virginia. In the three years preceding the decision in *Nelson*, a total of 1092 Writs of Error were either granted or refused in criminal cases by the Supreme Court of Virginia—an average of 364 cases a year. In the comparable three year span following the decision in *Nelson*, 1970-1972, a total of 1906 Writs of Error were acted upon by the Supreme Court of Virginia—an average of 635 cases per year. This is a remarkable increase that cannot be totally attributed to the normal increase in criminal prosecutions.

An additional concern on the part of the Amicus Curiae is the probable impact of providing counsel for the seeking of review in this Honorable Court and, in light of *Nelson*, the probable obligation on appellate counsel to advise his client of these rights after the Writ of Error is refused by the Supreme Court of Virginia, and in a case where review was granted and it has been decided adverse to the defendant. There will obviously be a material increase in the number of Petitions for Writs of Certiorari filed in this Court from Virginia, as well as from the other states within the Fourth Circuit—and the Commonwealth will be responsible for preparing, reproducing and filing Briefs in Opposition to the Granting of a Writ of Certiorari or Motions to Dismiss or Affirm in direct review cases filed herein. Thus, there will be a substantial increase in the workload of the Criminal Litigation Division of the Office of the Attorney General of Virginia, and this increase would come at a time when the emphasis in that office has shifted toward providing greater technical support to local law enforcement and prosecutorial officials so as to improve the administration of the criminal justice system.

Lastly, but not least, the Amicus Curiae, like all those properly concerned with the effective and efficient disposition of cases in this Honorable Court, is disturbed by the

probable impact of the Court of Appeals decision on the caseload of this Honorable Court. As Chief Justice Burger pointed out in his annual report on the state of the Federal judicial branch to the American Bar Association, the number of docketed cases before this Court increased from 1463 in 1953 to 4640 in 1972 (Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1129 (1973)). If the decision of the Court below is allowed to stand, a comparable increase might be possible within a space of two or three years rather than 19.

Accordingly, the Commonwealth of Virginia, with the sponsorship of its Attorney General, offers this brief in support of the petitioner's argument that counsel should not be provided as a constitutional right to assist State prisoners in seeking review of state appellate court determinations in this Honorable Court.

ARGUMENT

This Honorable Court Should Grant A Writ Of Certiorari In The Instant Case To Review The Decision Of The United States Court Of Appeals For The Fourth Circuit That A State Must Provide Counsel At Every Stage In The Appellate Process From A Criminal Conviction, Including The Discretionary Portion Of A Two-Tier Appellate System And For The Seeking Of Review In The Supreme Court Of The United States, Especially Where The Decision Of The Court Below Is Contrary To The Prior Practices Of This Court And Is Contrary To The Express Holding Of The United States Court Of Appeals For The Tenth Circuit In Peters v. Cox, 341 F.2d 575 (10th Cir. 1965), And To The Implicit Holding Of The Seventh Circuit In United States ex rel. Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969).

The United States Court of Appeals for the Fourth Circuit prefaced their decision in these cases by acknowledging that they were "met with the questions reserved by the

Court in *Douglas v. California*, 372 U.S. 353." (483 F.2d at 650). The Court below then proceeded to decide those "questions reserved" in a manner so as to have a decided impact on the administration of the appellate portion of the criminal justice system. As previously pointed out, and as recognized by the Court below, the Commonwealth of Virginia has no specific concern with the decision of the Court of Appeals in Case No. 72-2480, as Virginia has, at the present time, a single-tier appellate system and counsel are provided for indigent criminal defendants at all stages in that process (483 F.2d at 653-654). However, Virginia does not presently have any procedure for requiring advice to unsuccessful criminal defendants in State appeals that they have a right to seek further review in the Supreme Court of the United States, nor does Virginia have any process whereby counsel will be provided to assist indigent defendants in seeking such review if the defendant seeks to avail himself of this opportunity. Consequently, the decision of the Court of Appeals with regard to this latter point is of great concern to the Amicus Curiae.

The Court below acknowledges that the Seventh and Tenth Circuits, in *Pennington* and *Peters*, had held to the contrary but the Court felt that these decisions in 1969 and 1965, respectively, were essentially outdated within the context of what was now "constitutionally requisite" (483 F.2d at 655). In *Peters*, the Tenth Circuit Court of Appeals held as follows:

"The question presented in this habeas corpus appeal is whether the Supreme Court of New Mexico denied appellant's constitutional rights by refusing in failing to appoint counsel to assist him in taking an appeal in a criminal case from that Court to the Supreme Court of the United States. We hold that there has been no

denial of constitutional rights under the circumstances of this case." (341 F.2d at 575).

Similarly, although the United States Court of Appeals for the Seventh Circuit was concerned with the question decided by the Court below in Case No. 72-2480, the Court partially based its determination on the practices of this Honorable Court in Petitions for Writs of Certiorari:

"We find support for our decision in the present practice of the United States Supreme Court with regard to petitions for writs of certiorari. The United States Supreme Court's disposition of a petition for a writ of certiorari is as fully discretionary as the Illinois Supreme Court's decision to grant a Rule 315 appeal. Both determinations are made after one appeal as of right has occurred. If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." (409 F.2d at 760).

The dissenting justices in the case of *Douglas v. California*, 372 U.S. 353 (1963), similarly relied on the practices of this Honorable Court (See dissenting opinion of Justice Clark, 372 U.S. at 359; dissenting opinion of Mr. Justice Harlan, joined by Mr. Justice Stewart, 372 U.S. at 365-366).

This Honorable Court's practice has been described in Stern & Gressman, *Supreme Court Practice* (4th Ed. 1969), as follows:

"No appointment of counsel before grant of review. The court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document. Requests for counsel at such early

stages have uniformly been rejected through the Clerk, acting on instructions from the Court. While the correctness and indeed the constitutionality of this refusal to appoint counsel to prepare the documents at this critical stage of Supreme Court litigation has been questioned at least with respect to the direct review of criminal prosecutions, there is no indication as yet that the court will change its policy in this respect." (Id. at 378; fn. omitted).

Where, as here, the decision of a court of appeals is in direct conflict with the prior decisions of two other circuit courts of appeals and is additionally in direct conflict with the prior practices of this Honorable Court and, as here, especially where the decision has such a decided impact upon the future course of the administration of justice, it would be appropriate to grant a Writ of Certiorari and review that decision.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia as Amicus Curiae on behalf of the petitioner herein respectfully requests this Honorable Court to grant a Writ of Certiorari to the judgments of the United States Court of Appeals for the Fourth Circuit and to reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for the Fourth Circuit with directions to

vacate its opinion and to remand the cases to the District Courts with instructions to dismiss the Petitions for Writs of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of November, 1973, I mailed copies of the foregoing brief of Amicus Curiae in support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by first-class mail to Honorable Robert Morgan, Attorney General of North Carolina, P. O. Box 629, Raleigh, North Carolina 27602, counsel for petitioners, and to Thomas B. Anderson, Jr., Esquire, Loflin, Anderson, Loflin and Goldsmith, 811 West Main Street, Durham, North Carolina, of counsel for respondent.

ROBERT E. SHEPHERD, JR.

Assistant Attorney General

